

Virk (Migration) [2021] AATA 2560 (31 May 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Karandeep Singh Virk

CASE NUMBER: 1815342

DIBP REFERENCE(S): CLF2013/191237

MEMBER: Margie Bourke

DATE: 31 May 2021

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221 (2)(c) of Schedule 2 to the Regulations.

Statement made on 31 May 2021 at 5:34pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 360

Migration Regulations 1994 (Cth), Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 21 May 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 13 August 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate concluded the applicant had not demonstrated he was in a genuine and continuing relationship with the sponsor or that they were committed to a shared life together. Further the delegate commented that the documents provided by the applicant in support of the ongoing relationship were documents that could be easily manufactured, and there was a lack of documents or evidence that had substance or credibility to corroborate the claim the couple were in a spousal relationship. The delegate found there was insufficient evidence to demonstrate the relationship between the applicant and the sponsor had progressed over the years.
5. The applicant provided the Tribunal with a significant number of documents and evidence in support of the application for review. The Tribunal has considered the information provided to the Department, and the concerns recorded in the Department's decision record. The Tribunal has considered the information provided to it by the applicant, and find the information addresses the concerns in the Department's decision record. The Tribunal takes a different view to the delegate in the Department's decision record. Further the Tribunal finds that the information and evidence available to it is sufficient to satisfy the Tribunal that it can make a decision favourable to the applicant on the information before it without proceeding to a hearing, pursuant to s.360(2)(a) of the Act.
6. The following are the written reasons that the Tribunal has concluded that the matter should be remitted for back to the Department for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

SPOUSE/DEFACTO (cl.801.221(2))

Whether the parties are in a spouse or de facto relationship

7. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
8. I am satisfied based on the notification of the grant, that the applicant was granted the Subclass 820 visa on 30 September 2014.

9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. Based on the marriage certificate I am satisfied that the parties married in Melbourne at the civil registry on 27 July 2013. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

11. *Financial aspects of the relationship*:- I am satisfied based on the documents provided to the Tribunal that the applicant and sponsor have jointly purchased a block of land in June 2019, and are currently building a home together on that land. I accept that the parties saved for the deposit, have a joint bank account for the purpose of the saving, obtained a mortgage, and are paying the house loan together. I therefore find that the applicant and sponsor jointly own a major asset and jointly have a substantial liability. I satisfied that the parties have pooled their financial resources to purchase a home and secure their real estate future.
12. I considered other financial aspects of the relationship, based on the evidence before me. I satisfied that the applicant has provided most of the financial support through his employment income, and I accept the sponsor has health issues which reduced her capacity to work and is in receipt of a disability pension. I note from the Centrelink records provided that the sponsor has recorded herself as partnered. I satisfied that the parties have a joint account, in the sense that it is in the name of the applicant and the sponsor is a signatory to the bank account, which they use for their day-to-day expenses.
13. I am satisfied that there is no evidence before me that one person in the relationship owes any legal obligation in respect of the other.
14. I accept based on the written statements from the applicant, the sponsor, the sponsor's parents and members of the family that the applicant and sponsor have resided in the home of the sponsor's parents. I satisfied that the parties have not paid board or rent, but have contributed to the expenses of the household. I accept the parties pay their phone bills and vehicle expenses from the joint account.
15. The evidence of the financial aspects of the relationship indicates to the Tribunal that the applicant and the sponsor have a genuine and continuing relationship, and have a mutual commitment to a shared life as a married couple to the exclusion of all others. I accept that the evidence of the financial aspects of the relationship is more substantial at the time of the Tribunal's decision as the parties have purchased their block of land together and are building a home, and this evidence was not available to the Department.

16. *Nature of the household:* – I am satisfied that the parties do not have any joint responsibility for the care and support of children. I accept the submission that the sponsor had a miscarriage in 2014. I accept the medical report dated 28 May 2021 that the applicant and sponsor are currently trying to conceive a child.
17. I am satisfied after assessing the consistent written evidence provided by the family members of the sponsor that the applicant and sponsor have resided at the home of the sponsor's parents since their marriage. I have considered the documents from diverse sources which record that the applicant and sponsor reside at that address. I am satisfied after considering the repeated statutory declarations and statements provided by family and friends that the applicant and sponsor live together in the home of the sponsor's parents as a married couple. I therefore accept the evidence before me of the living arrangements of the applicant and sponsor, that the applicant and sponsor reside together in their own room as a couple in the home of the sponsor's parents.
18. I have considered the written descriptions of the shared responsibility of the house work in relation to the applicant and the sponsor. I am satisfied that the applicant has been working during the course of the relationship, and for this reason the sponsor has undertaken a greater proportion of their domestic chores. I am satisfied based on the medical reports provided and statements from family members, that the sponsor has struggled with physical and mental health conditions during the course of the relationship. I am satisfied that the couple reside in the home of the sponsor's parents and I accept therefore that the applicant and sponsor are not responsible for managing their own household. I accept based on the statement of the sponsor's parents, that the members of the household share the tasks within that household.
19. I accept based on the consistent written evidence provided to the Department and to the Tribunal that the evidence of the nature of the household indicates that the parties are in a genuine and continuing relationship, and live together, and not separately and apart, on a permanent basis, at the time of decision.
20. *Social aspects of the relationship:* – I have considered the written evidence which includes medical reports, psychological reports, and statutory declarations and statements from family members and friends of both the applicant and the sponsor, the Centrelink statement, and the applicant's tax return and I am satisfied that the parties represent themselves to their family members and the community and government organisations as being married to each other.
21. I have considered the evidence of the medical reports dated from 2013 to 2021, that the applicant's and sponsor's family doctor opines that he considers the parties are in a genuine married relationship. I have considered the reports from the sponsor's treating psychotherapist/counsellor that she considers the parties are in a genuine married relationship, and that the sponsor relies on her husband for ongoing support. The most recent report from the sponsor's treating psychotherapist is dated May 2021. I have considered the statutory declarations from the sponsor's siblings, her brother's partner and from long-term friends of both the applicant and the sponsor which describe the relationship between the applicant and the sponsor as genuine, loving, positive and supportive. I have considered the statements and statutory declarations provided from the sponsor's parents over the course of the application for the visa, who have lived with the applicant and sponsor for nearly 8 years, and who describe the relationship as very supportive and genuine. I note that the statutory declarations from the sponsor's brother, sister and parents are current and are dated May 2021.
22. I have considered the photographs provided by the applicant, evidence that the applicant and sponsor travelled to India to have a celebration (after they were married) with the

applicant's family, evidence of the applicant's and sponsor's commitment to and walking their dog, (and now their new dog) and evidence of their regular social activities including dinner with the sponsor's family, the family interest in football, going to restaurants and day trips.

23. I am satisfied that the evidence of the social aspect of the relationship is substantial evidence that the applicant and sponsor have a mutual commitment to a shared life as a married couple to the exclusion of all others, that they are in a genuine and continuing relationship, and that they live together, and not separately and apart, on a permanent basis, at the time of this decision.
24. *Nature of the persons' commitment to each other:* – as stated above I satisfied that the parties have been married since 27 July 2013, and have lived together at the home of the sponsors parents since that time. At the time of this decision I satisfied that the parties have been married and lived together for seven years and 10 months.
25. I have considered the written evidence provided to the Tribunal from the applicant's and sponsor's treating doctor, and the sponsor's psychotherapist/counsellor and I satisfied there is medical evidence before the tribunal that the applicant provides emotional and practical support to the sponsor. I am satisfied based on the consistent information provided in the statutory declarations and letters of support from family members and friends that the applicant has been a person of support and nurture to the sponsor through her physical and mental health conditions throughout the relationship. I am satisfied based on my assessment and evaluation of the written evidence of the relationship between the applicant and the sponsor, that their relationship is one of companionship and friendship and they provide ongoing support to each other.
26. I satisfied based on the evidence before me that the parties have purchased a block of land and are building a home. I satisfied the applicant and the sponsor have saved for the deposits for these substantial purchases. I accept the medical evidence that the parties are trying to conceive a child, and are somewhat restricted by the sponsor's medical conditions. I accept that the parties have been married for nearly 8 years, have purchased their own land, are building a house and are trying to start a family. My assessment of this evidence is that the applicant and sponsor consider their relationship is long-term, and are planning for the future. I accept the written evidence of their family members, that they also see the relationship as a long-term relationship.
27. The evidence of the nature of the person's commitment to each other indicates to the Tribunal that the applicant and sponsor are in a genuine and continuing relationship, and that they have a mutual commitment to a shared life as a married couple to the exclusion of all others, at the time of decision.
- 28.
29. *Conclusions:* – I have considered the circumstances of the relationship as set out in r.1.15A(3)(a), (b), (c) and (d), and I find that the evidence of the circumstances of the relationship is that the applicant and sponsor have a mutual commitment to a shared life to the exclusion of all others, that they are in a genuine and continuing relationship, and that they live together, and not separately and apart, on a permanent basis.
30. For the above reasons I am satisfied that the applicant meets the requirements of s.5F(2)(a) – (d), and is in a spousal relationship with the sponsor at the time of this decision.
31. Given the findings that the Tribunal is satisfied that the requirements of s.5F(2) are met, the applicant is the spouse of the sponsoring partner at the time of decision, and therefore the applicant meets the requirements of cl.801.221(2)(c).

32. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

33. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221(2)(c) of Schedule 2 to the Regulations.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).